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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/866,326	05/25/2001	James Arthur Davis	16,234	5265

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EXAMINER

REICHLE, KARIN M

ART UNIT	PAPER NUMBER
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3761

DATE MAILED: 10/10/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

S.M.

# Office Action Summary

Applicati n No.

09/866,326

Applicant(s)

DAVIS ET AL.

Examiner

Karin M. Reichle

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 22 July 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-33 is/are pending in the application.
- 4a) Of the above claim(s) 3,4,8-12,15,17 and 32 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,2,5-7,13,14,16,18-31 and 33 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 25 May 2001 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 4. 6) ☐ Other:

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1. Claims 3, 4, 8-12, 15, 17 and 32 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected species, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in Paper No. 6.

The withdrawn claims recite structure not shown in the Figures 4-5, the elected species. It is noted that the claims which are readable on the species is based on the Figures. The structure in these Figures is described on page 3, lines 8-10 and page 11, second full paragraph. Figures 4-5 do not show connection means 32 with a valve, valving means 34 with a valve for intake from outside, a pump 20 with desiccant, pumping means 20 with a piping for connecting the pump to the article, bellows 20 of the claimed materials, connection means 32 in the leg area, pump means 20 capable of use with more than one article or readily removable from the product.

2. Applicant's election with traverse of the species of Figures 4-5 in Paper No. 6 is acknowledged. The traversal is on the ground(s) set forth in Paper No. 6. This is not found persuasive because 1) with regard to Applicant's remarks in the first paragraph, such are treated as the election of Figures 4 and 5 and the indication of claims 7, 9, 13 and 33 as being readable thereon because a conditional election would be nonresponsive, see election requirement of Paper No. 3 and the terminology "generic" as used in the election requirement refers to claims which read on all the species identified in the election, not that elected. The claims deemed readable on the elected species are set forth in the preceding paragraph. 2) Therefore, as set forth in the Applicant's remarks in the second full paragraph, the statement regarding what claims are generic in the election requirement is correct since it referred to the claims which read on all the identified

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species, not just those readable on Figures 4-5. Again see paragraph 1 with respect to which claims read on the elected species as compared to as being generic to all the species. 3) Finally Applicant's remarks in the third and fourth full paragraphs of Paper No. 6, are deemed nonpersuasive because as set forth in MPEP 806.04(e) claims are not species. Species are defined by the Figures and claims are chosen as readable thereon by what is shown in the Figures. Also, MPEP 803.02 referred to by Applicant refers to restriction practice with regard to Markush claims which is not applicable here nor includes any basis for the arguments made by Applicant.

The requirement is still deemed proper and is therefore made FINAL.

*pm 10/2/02*  
3. It is noted that the assignment referred to <sup>in</sup> the transmittal papers is not of record in the file. However, it is also noted that a copy of the notice of recordation of assignment is of record as part of the request for corrected filing receipt filed 1-4-02.

4. Th prior art cited in the specification has been noted but will not appear on the front of a patent, if any, unless cited on a PTO-892 or -1449 accompanying this action, since such citations do not comply with 37 CFR 1.56, 1.97 and 1.98.

5. The abstract of the disclosure is objected to because terminology which can be inferred and legal terminology, i.e. "The present invention relates to", "comprising" and "means", should be avoided. Correction is required. See MPEP § 608.01(b).

6. The drawings are objected to because the numeral 24 has been used to describe both the outer surface of the bellows and the intake valve, see page 10, last paragraph and pages 11-12, bridging paragraph. Also the valve 28 shown in Figure 3 and the description in the paragraph

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bridging pages 11-12 is inconsistent, i.e. the valve 28 as shown would be opened upon inflation and closed upon deflation of the bellows. In Figure 5, 32 does not appear to denote a connection means. A proposed drawing correction or corrected drawings are required in reply to the Office action to avoid abandonment of the application. The objection to the drawings will not be held in abeyance.

7. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the invention as claimed in claims 1-2, 5-7, 13-14, 16, 18-31 and 33, i.e. topsheet, backsheet, connection means permitting the connection of a pumping means, bellows, must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

A proposed drawing correction or corrected drawings are required in reply to the Office action to avoid abandonment of the application. The objection to the drawings will not be held in abeyance.

8. The disclosure is objected to because of the following informalities: 1) The Summary of the Invention section, i.e. a description of the claimed invention, and the invention of the claims should be commensurate, see MPEP 608.01(d) and 1302.01, e.g. where in the claims is desiccant on the inside of the valving means claimed? 2) On page 5, line 12, is Starret a trademark? If so, it should be properly denoted as such. 3) As discussed supra, the numeral 24 has been used to describe two different structures which is improper. Also, as discussed supra the description and the Figures are inconsistent, i.e. elements 28 and 32. 4) In the paragraph bridging pages 12-13,

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the terminology, i.e. "In the claims...structures." should be avoided, i.e. such describes legal interpretation which is determined by the courts and the legislature. Appropriate correction is required.

9. The use of the terminology "valving means", "connection means which...means", "pumping means", "the valve...means allows...article", "any manual...means...article", distribution means", "distribution means facilitates ...wearer.", "manual or mechanically assisted means" in the claims is not considered to invoke 35 USC 112, sixth paragraph, since such either is not presented in proper "means for" format and/or is claimed with sufficient specific structure of the means in the same claim to perform the claimed function.

10. Claims 1-2, 5-7, 13-14, 16, 18-31 and 33 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In regard to claims 1 and 6-7, 13, 16 and 18-19, it is unclear whether Applicant is claiming the pumping means as part of the claimed combination, i.e. claims 6-7, 13, 16, 18-19, or not, i.e. claim 1. In regard to claim 2, a positive antecedent basis for "the product" should be defined. In regard to claim 6, the terminology "any" is redundant, i.e. see terminology "comprises" which precedes it. Also it is unclear whether the terminology "manual or mechanically assisted" is part of the "name" given to the means or whether it is further modification of the function, i.e. Applicant is claiming means for manually or mechanically assisted passage of air. In claims 18 and 19, a positive structural antecedent basis for "the external pumping means" would be set

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forth. In regard to claims 28 and 30, it is unclear whether Applicant is claiming a pump connected to the connection means or not in claim 30, see claim 28, line 3 and claim 30, line 1. Also a positive structural antecedent basis for "the absorbent article" or "the article" should be set forth.

In claim 31, is Applicant claiming a self-contained pump or not, i.e. "may be"?

11. Claim 28 would be in better form if "the skin" on the last line were --skin-- and claim 30 be in better form if "a wearer's" on the last line were --the wearer's--.

12. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(e) the invention was described in-

(1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effect under this subsection of a national application published under section 122(b) only if the international application designating the United States was published under Article 21(2)(a) of such treaty in the English language; or

(2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that a patent shall not be deemed filed in the United States for the purposes of this subsection based on the filing of an international application filed under the treaty defined in section 351(a).

13. Claims 1-2, 5-7, 13-14, 16, 18-31 and 33 are rejected under 35 U.S.C. 102(e) as being anticipated by Lau et al.

The applied reference has a common inventor with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art under 35 U.S.C. 102(e).

This rejection under 35 U.S.C. 102(e) might be overcome either by a showing under 37 CFR

1.132 that any invention disclosed but not claimed in the reference was derived from the inventor

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of this application and is thus not the invention "by another," or by an appropriate showing under 37 CFR 1.131.

See Figures 4 and 5, i.e. absorbent article or personal care product having a topsheet and backsheet 20, see also col. 3, lines 44-50, valving means or distribution means, i.e. 25 is valve, connection leading thereto is piping, juncture between piping and 21 is connection means, pumping means, i.e bellows 21, valves 24. Also see abstract, col. 1, lines 56-67, col. 2, lines 10-13, col. 5, lines 7-14, 25-38, col. 6, lines 20-50 and claims.

14. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321© may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).



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15. Claims 28-31 and 33 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 6, and thus also claim 5 by dependence therefrom, of U.S. Patent No. 6,454,749. Although the conflicting claims are not identical, they are not patentably distinct from each other because since the instant application was filed after the patent the one way In re Vogel test applies, i.e. are the claims of the application obvious in view of the claims of the patent, and the answer to the test is yes. Specifically the claims of both the application and patent require a "personal care product" as interpreted in light of the descriptions, see portions of patent cited supra, the patent claims require distribution means including piping conveying air from a bellows, i.e obviously the bellows is a self contained pump and there is a structure between the piping and bellows to provide the conveying which is a "connection" therebetween and both the claims of the application and patent require distribution of air or air exchange between the wearer's skin and the product.

16. Claims 28-31 and 33 are directed to an invention not patentably distinct from claims 5-6 of commonly assigned 6, 454,749. Specifically, see preceding double patenting rejection.

17. The U.S. Patent and Trademark Office normally will not institute an interference between applications or a patent and an application of common ownership (see MPEP § 2302).

Commonly assigned 6,454,749, discussed above, would form the basis for a rejection of the noted claims under 35 U.S.C. 103(a) if the commonly assigned case qualifies as prior art under 35 U.S.C. 102(f) or (g) and the conflicting inventions were not commonly owned at the time the invention in this application was made. In order for the examiner to resolve this issue, the

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assignee is required under 37 CFR 1.78© and 35 U.S.C. 132 to either show that the conflicting inventions were commonly owned at the time the invention in this application was made or to name the prior inventor of the conflicting subject matter. Failure to comply with this requirement will result in a holding of abandonment of the application.

A showing that the inventions were commonly owned at the time the invention in this application was made will preclude a rejection under 35 U.S.C. 103(a) based upon the commonly assigned case as a reference under 35 U.S.C. 102(f) or (g), or 35 U.S.C. 102(e) for applications filed on or after November 29, 1999.

18. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. The prior art shows other ventilated garments or garments which have air passed into at least a portion thereof. Attention is especially drawn to the Gioello and Gross et al patents which teach ventilated garments which can be of various types, e.g. shirts, pants, and applications, e.g. medical, which include pumps including bellows, valves, tubing or piping and connections.

19. Any inquiry concerning this communication should be directed to K. M. Reichle at telephone number 703-308-2617. The Examiner's regular work schedule is Monday-Thursday.

KMR

*K.M. Reichle*  
K.M. Reichle  
Patent Examiner

October 2, 2002